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The ERA: The Task Ahead

by Leo Kanowitz*

Introduction

Seven years ago this week, on March 22, 1972, the United States Congress adopted a joint resolution proposing the Equal Rights Amendment (ERA) to the Federal Constitution and setting a seven-year limit within which the necessary thirty-eight state legislative ratifications were to have occurred.¹ As you all know, when it became clear to the ERA's supporters last year that those ratifications would not be forthcoming by the original deadline, they successfully persuaded Congress to extend it by an additional thirty-nine months.² Because this week marks the original deadline, and the Amendment has still not been ratified,³ I thought it appropriate to use this occasion to review the

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This article is based on a speech delivered by the author on March 20, 1979 at New Mexico State University where he was serving, from March 14th to March 31st, as a Distinguished Visiting Professor.

1. See S.J. Res. 8, 92d Cong., 2d Sess. (1972), H.R.J. Res. 208, 92d Cong., 1st Sess. (1971), 86 Stat. 1523.

2. See Note, *The Amending Process: Extending the Ratification Deadline of the Proposed Equal Rights Amendment*, 10 RUT.-CAM. L.J. 91 (1978).

3. As of the date this speech was given, thirty-five states had ratified the ERA. Only one state, Indiana, has given its ratification within the last four years, while five states, including Indiana, have "rescinded" their ratifications.

States ratifying the ERA are:

Hawaii	March 22, 1972
Delaware	March 23, 1972
New Hampshire	March 23, 1972
Idaho	March 24, 1972
Kansas	March 28, 1972
Nebraska	March 29, 1972
Tennessee	April 4, 1972
Alaska	April 5, 1972
Rhode Island	April 14, 1972
New Jersey	April 17, 1972
Texas	April 19, 1972
Iowa	April 21, 1972
Colorado	April 21, 1972
West Virginia	April 22, 1972
Wisconsin	April 26, 1972
New York	May 3, 1972

campaign for the Amendment to date.

I want to discuss what has impeded the ratification efforts up to now, and what can be done to assure that the Amendment will be ratified within the extended period that Congress has granted. In particular, I would like to explore the following questions: 1) What have been the positive results in the campaign to this point that has brought the ERA so close to ratification despite its highly controversial implications? 2) What mistakes have been made in that campaign? 3) How can they be avoided in future efforts on behalf of ERA ratification?

I. Background: The Perceived Need

In addressing these questions, one has to begin with the state of affairs that led initially to the perceived need for an Equal Rights Amendment to the Federal Constitution.⁴ It will come as no great rev-

Michigan	May 22, 1972
Maryland	May 26, 1972
Massachusetts	June 21, 1972
Kentucky	June 26, 1972
Pennsylvania	September 26, 1972
California	November 13, 1972
Wyoming	January 26, 1973
South Dakota	February 5, 1973
Oregon	February 8, 1973
Minnesota	February 12, 1973
New Mexico	February 28, 1973
Vermont	March 1, 1973
Connecticut	March 15, 1973
Washington	March 27, 1973
Maine	January 18, 1974
Montana	January 25, 1974
Ohio	February 7, 1974
North Dakota	February 3, 1975
Indiana	January 18, 1977

[1979] U.S. CODE CONG. & AD. NEWS 349.

States "rescinding" ratification are: Idaho, Indiana, Nebraska, Tennessee and Kentucky, although Kentucky's rescission was vetoed by the state's acting governor.

For the position that rescissions are invalid, see Kanowitz & Klinger, *Can a State Rescind Its Equal Rights Amendment Ratification: Who Decides and How?*, 28 HASTINGS L.J. 979 (1977). But see, Rhodes & Mabile, *Ratification of Proposed Federal Constitutional Amendments—The States May Rescind*, 45 TENN. L. REV. 703 (1978). The question of the constitutionality of rescission has generated much discussion. See generally, Burke, *Validity of Attempts to Rescind Ratification of the Equal Rights Amendment*, 8 U.W. LA. L. REV. 1 (1976); Heckman, *Ratification Of A Constitutional Amendment: Can A State Change Its Mind?*, 6 CONN. L. REV. 28 (1973); Note, *The Equal Rights Amendment: Will States Be Allowed to Change Their Minds?*, 49 NOTRE DAME LAW 657 (1974); Comment, *Constitutional Amendments—The Justiciability of Ratification and Retraction*, 41 TENN. L. REV. 93 (1973).

4. See generally L. KANOWITZ, *WOMEN AND THE LAW: THE UNFINISHED REVOLUTION* (1969) [hereinafter cited as KANOWITZ, *WOMEN AND THE LAW*]; Brown, Emerson,

elation that on a social level in the United States, as in other countries, men and women have been assigned specific roles solely on the basis of their sex. That such an assignment has been arbitrary and bears no relationship to the abilities, desires, and hopes of individual men and women has long been evident to most people who have thought about the matter.

But as long as discriminatory treatment of the sexes occurred strictly in the private, social sphere, relatively little could be done about it. I say "relatively" because governments could have acted as they have done in recent years, under the commerce clause of the Federal Constitution⁵ or the inherent police power of the states,⁶ to prohibit such discrimination even in the private sphere. But this kind of decision requires a heightened level of commitment to the eradication of sex discrimination. It requires new, positive acts by either the federal or state legislatures, or both, acts that can be induced only if the right combination of political circumstances and pressures converge and are felt.

By contrast, when social prejudices about the appropriate roles of the sexes are translated into government action, with the result that laws—whether in the form of statutes, or of decisions by courts or administrative agencies—accord one kind of official treatment to men and another to women, the validity of such differential treatment is immediately suspect in the light of various constitutional restraints on governmental power.⁷ Those restraints flow from the two privileges and immunities clauses, which require respect for rights inhering in state and federal citizenship;⁸ the due process clauses of the Fifth⁹ and Four-

Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971).

5. See cases discussed at note 60 *infra*.

6. See, e.g., California Fair Employment Practices Act, CAL. LABOR CODE § 1411, *et seq.* (West 1978). Section 1411 prohibits discrimination in employment on the grounds, *inter alia*, of sex. The law was upheld as a valid exercise of the state police power in *Northern Inyo Hosp. v. Fair Employment Practice Comm'n*, 38 Cal. App. 3d 14, 112 Cal. Rptr. 872 (1974).

7. For discussions of the constitutional aspects of sex discriminatory laws, see, e.g., Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451 (1978); Ginsburg, *Gender and the Constitution*, 44 U. CINN. L. REV. 1 (1975); Lombard, *Sex: A Classification in Search of Strict Scrutiny*, 21 WAYNE L. REV. 1355 (1975); Note, *Sex Discrimination and Equal Protection: The Question of a Suspect Classification*, 5 N.Y.U. REV. L. & SOC. CHANGE 1 (1975).

8. U.S. CONST. art. IV, § 2, cl. 1 provides: "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." U.S. CONST. amend. XIV, § 1 provides, in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . ."

9. U.S. CONST. amend. V, provides, in pertinent part: "[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law. . . ." The due process

teenth Amendments;¹⁰ and the equal protection clause of the Fourteenth Amendment.¹¹

That sex discriminatory laws existed and still exist is now probably a matter of common knowledge. When the congressional joint declaration sending the ERA on its ratification road was first passed in 1972, thousands of laws in the states and at the federal level drew sharp distinctions between the sexes on the basis of widely-held, but questionable assumptions and generalizations about them. Some made the husband the head and master of the family.¹² Many required wives to assume their husbands' surnames and lose their own.¹³ Others granted preferences to mothers over fathers in disputes involving the custody of minor children.¹⁴ Still others gave husbands superior rights to manage

provision of this amendment has been held to embody an equal protection guarantee as against the federal government, *Mathews v. De Castro*, 429 U.S. 181, 182 n.1 (1976); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

10. U.S. CONST. amend. XIV, § 1, provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

11. U.S. CONST. amend. XIV, § 1, provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

12. *See, e.g.*, former CAL. CIV. CODE §§ 156, 172 and 172a. § 156 provided: "The husband is the head of the family. He may choose any reasonable place or mode of living, and the wife must conform thereto." § 172 provided: "The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; *provided, however*, that he can not make a gift of such community personal property . . . without a valuable consideration . . . without the written consent of the wife." § 172a similarly gave the husband management and control of the community real property. (West 1954).

§ 156 was finally repealed effective Jan. 1, 1975. CAL. CIV. CODE § 5101. Sections replacing § 172 and § 172a now provide for common control of community property. CAL. CIV. CODE §§ 5125, 5127 (West Supp. 1978) (effective Jan. 1, 1975).

13. *See, e.g.*, *Forbush v. Wallace*, 405 U.S. 970 (1972), *aff'g*, 341 F. Supp. 217 (M.D. Ala. 1971). Based on Alabama's common law rule that the husband's surname is the wife's legal name, the district court upheld an unwritten regulation of the Department of Public Safety which required each married female to use her husband's surname in applying for and obtaining a drivers' license. The court found that the state's interest in preserving the integrity of identification and drivers' records through licenses was a significant state interest. Requiring married females to use the husband's surname was found to be reasonably related to that end. *Id.* 221-22. The Supreme Court affirmed without opinion.

14. *See, e.g.*, *Juri v. Juri*, 69 Cal. App. 2d 773, 160 P.2d 73 (1945). Upholding the custody award of the former marriage's two offspring to the wife, the California court of appeal cited former CAL. CIV. CODE § 138(2) (West 1954), which provided, in pertinent part: "other things being equal, if the child is of tender years, custody should be given to the mother; if the child is of an age to require education and preparation for labor or business, then custody should be given to the father." Former § 138 was replaced by CAL. CIV. CODE § 4600 (West Supp. 1978) (amended 1970), which abolishes both statutory preferences. The *Juri* court observed: "'it is not open to question, and indeed it is universally recognized, that the mother is the natural custodian of her young. This view proceeds on the well known fact that there is no satisfactory substitute for a mother's love.'" 69 Cal. App. 2d at 779, 160 P.2d at 76 (quoting *Washburn v. Washburn*, 49 Cal. App. 2d 581, 588, 122 P.2d 96, 100 (1942)).

and control their wives' property.¹⁵ Some required women to be sentenced to longer prison terms than men upon conviction of the same crime.¹⁶ Others denied the right of women to serve on a jury.¹⁷ Some provided protection to women in the workplace while denying such protection to men.¹⁸ At the federal level, only men were subject to the obligation of compulsory military service.¹⁹ And women who contributed large sums to the Social Security system were denied benefits for their spouses and children equal to those accorded men who made the same payments.²⁰

The list can be enlarged. These are only examples of how the law treated one sex less favorably than another—at times preferring the male to the female, at other times reversing its preference. It is no surprise, therefore, to learn that over the years constitutional challenges to

The bias toward awarding custody to the mother remains where the children are illegitimate. Recently the United States Supreme Court upheld a Georgia statute which recognizes the mother as sole parent and gives to the mother all the "paternal" power. The father challenged the statute, claiming it violated equal protection by denying him visitation rights if his child were adopted without being legitimized. *See Quilloin v. Walcott*, 434 U.S. 246 (1978); GA. CODE ANN. § 74-203 (1973).

15. *See, e.g., Childs v. Charles*, 46 Ga. App. 648, 168 S.E. 914 (1933) (accrued rent held not payable to wife's estate, although title was in wife and wife contracted with the boarder, because husband as head of the household had superior power to make contracts regarding the property).

16. *See, e.g., State v. Costello*, 56 N.J. 334, 282 A.2d 748 (1971) (where females were subject to indeterminate sentence of up to five years not reducible for continuous orderly deportment, while males were subject to sentencing by judge for less than maximum term and reduction for good behavior for same offense, disparate sentencing treatment impinging on fundamental interests and state would be required to show a substantial justification for sentencing scheme on remand).

17. *See, e.g., State v. Hall*, 187 So.2d 861 (1966) (exclusion of women from jury service pursuant to statute did not deny woman defendant her right to equal protection of the law under the 14th Amendment).

18. Among these were maximum hours laws for women, or women and minors, only, *see KANOWITZ, WOMEN AND THE LAW, supra* note 4, at 117-24, 182-88 (1969); weight-lifting limits in employment that were applicable only to women workers, *id.* at 114-17; and women-only minimum wage provisions, *id.* at 188-92.

19. *See United States v. Reiser*, 394 F. Supp. 1060 (D. Mont. 1975), *rev'd*, 532 F.2d 673 (9th Cir. 1976) (court of appeals reversed decision wherein defendant male draftee's motion to dismiss an indictment against him for failure to submit to induction was granted. The district court found the sex-based classification suspect and held that the government failed to demonstrate a compelling interest in the distinction. The draft law that inducted only males and not females was held violative of equal protection).

20. *See Weinberger v. Wiensfeld*, 420 U.S. 636 (1975) (Social Security Act provision that granted survivors' benefits based on earnings of a deceased husband and father to both widow and minor children in her care, but granted benefits based on earnings of a deceased wife only to the minor children and not the widower, violated the equal protection clause. The Court held that both widows and widowers should receive support to enable them to care for young children at home, and noted that women's earnings contribute to a family's support as do men's, and that benefits accruing from earnings should be equal).

such official discriminatory treatment had found their way to the United States Supreme Court.

I will not review the many decisions of the state courts and lower federal courts upholding sex discriminatory laws against a variety of constitutional challenges.²¹ Suffice it to say that these decisions were numerous and virtually unanimous in sustaining such differential treatment by government on the basis of sex. But I do want to describe four important pre-1972 cases decided by the Supreme Court in this area, all of which rejected constitutional challenges to official sex discrimination.

One is the crucial 1908 decision in *Muller v. Oregon*.²² In that case, the Court upheld, as against a challenge under the due process clause of the Fourteenth Amendment, a state statute prescribing maximum hours for only women workers in certain kinds of employment—a statute that had been enacted without regard to the capacities of *individual* men and women to work beyond the maximum number of hours it prescribed. The Court's justification for this result, when all its rhetoric in a lengthy opinion is reduced to its essential point, was simply that women and men *generally* have different physiques.

In *Goesaert v. Cleary*,²³ another case decided under the equal protection clause of the Fourteenth Amendment in 1954, the Court held that equal protection was not violated by a state statute prohibiting women who were not related by blood or marriage to the bar owners from working as bartenders, though the statute did not impose similar limitations on the employment rights of males who wished to pursue that occupation.²⁴ In still another case, *Hoyt v. Florida*,²⁵ decided in 1961, the Court again rejected an equal protection challenge to a sex-discriminatory law limiting the right of women to serve as jurors without imposing a similar limitation on the right of males to do so.²⁶

The case of *Bradwell v. The State*²⁷—although the earliest of this group of four decisions, having been rendered by the Court in 1872—is especially instructive. In *Bradwell*, the United States Supreme Court,

21. See KANOWITZ, *WOMEN AND THE LAW*, *supra* note 4, at 154-92; Note, *Are Sex-based Classifications Constitutionally Suspect?*, 66 NW. U.L. REV. 481 (1971); and sources cited at note 4 *supra*.

22. 208 U.S. 412 (1908).

23. 335 U.S. 464 (1948).

24. *Id.* at 467.

25. 368 U.S. 57 (1961).

26. *Id.* at 69. In 1975, relying on the defendant's Sixth Amendment right to a jury trial in criminal cases, the Court held it unconstitutional to exclude women or give them automatic exemptions from jury duty based on sex. *Taylor v. Louisiana*, 419 U.S. 522 (1975).

27. 83 U.S. (16 Wall.) 130 (1872).

rejecting challenges under the privileges and immunities clauses of the federal constitution, upheld the right of a state to deny women, solely on the basis of their sex, the right to practice law.²⁸ More important than *Bradwell's* result, however, is the language employed by a concurring Justice, Mr. Justice Bradley, explaining the reasons for his vote. As he saw it:

Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.²⁹

Elsewhere in his opinion, Justice Bradley noted: "The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases."³⁰ In the same case, the Illinois Supreme Court had earlier written: "That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply and execute the laws, was regarded as an almost axiomatic truth."³¹

As charitable as one tries to be, one cannot help concluding that the attitudes expressed in these excerpts indicate a thoughtless, prejudiced, and reactionary view of women in society. If one is less charitable, one is reminded by these words of Adolph Hitler's infamous statement about the appropriate role of women in society: *Kinder, Kirche, und Kuche*—Children, Church and Kitchen.

For present purposes, what is important is that despite some subtle degrees of sophistication in the three later Supreme Court decisions alluded to above, at their core they expressed to some degree or another the fundamentally sexist assumptions underlying Mr. Justice Bradley's opinion in *Bradwell v. The State*. To be sure, they each relied on detailed analyses of the particular issues before the Court. But, especially in view of later developments in the Court, it is clear that the results

28. *Id.* at 139.

29. *Id.* at 141.

30. *Id.* at 141-42.

31. In re *Bradwell*, 55 Ill. 535, 539 (1869).

they reached were by no means inevitable. The prevailing sexist bias of the society at large, one has to conclude, must have played a role in the results actually reached in those cases.

Equally important, these cases developed the doctrine that "sex is a reasonable basis for classification." In earlier cases under the due process and equal protection clauses,³² the Court had in the realm of social and economic legislation established the principle that, to pass muster under these constitutional provisions, a law need only create a reasonable classification designed to implement a legitimate governmental policy. Sex classification by definition thus became automatically valid.

By contrast, between the last of these four decisions³³ and the early 1970's, the Court had developed a different standard of scrutiny under the Fourteenth Amendment's equal protection guarantee for classifications characterized by the Court as "suspect"—such as those based on race, national origin, or alienage—or for those that curbed what the Court could characterize as a "fundamental" right of one group without curbing that same right for another group that seemed to be similarly situated.³⁴ In cases involving suspect classifications³⁵ or in those infringing upon fundamental rights,³⁶ the Court imposed a greater burden of justification on one who sought to rely on the governmentally-imposed classification. It was not sufficient that the classification be rationally related to the achievement of a legitimate governmental policy, as was true generally with regard to economic and social legislation. Rather, to pass muster the classification had to be shown to be necessary for the achievement of an overwhelming or compelling state interest. In this formulation "necessary" meant absolutely necessary—that is, the test would not be satisfied if less drastic alternatives would have achieved the same ends. Similarly, what constituted a compelling

32. See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911); see generally, Tussman & TenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949).

33. *Hoyt v. Florida*, 368 U.S. 57 (1961).

34. See *Forum, Equal Protection and the Burger Court*, 2 HASTINGS CONST. L.Q. 645 (1975); see generally, Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

35. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (state antimiscegenation laws which discriminate on the basis of race violate the equal protection clause); *Korematsu v. United States*, 323 U.S. 214 (1944) (statutes which discriminate against a class of persons because of their national origin must be strictly scrutinized).

36. Interference with a "fundamental" right triggers a more stringent standard of review. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374 (1978) (marriage is a fundamental right); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel is fundamental); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (right to vote is fundamental).

or overwhelming state interest was also strictly construed. Once such a test was imposed, it became obviously much more difficult for a race-based classification, for example, to pass constitutional muster.³⁷

In recent years, therefore, much of the effort of those bringing sex discrimination cases before the United States Supreme Court has been aimed at convincing the Court to adopt for sex classifications the same heightened level of scrutiny that it now requires for racial classifications.³⁸ The underlying argument, of course, has been that analytically, the fundamental social, political, and legal factors are the same in both instances.³⁹ The Court's response to those efforts—and the reasons for that response—will be dealt with below.

It was against this background of the Supreme Court's insensitivity to the problems of sex discrimination in American law that the movement for the adoption of the Equal Rights Amendment, which began in the early 1920's, led on March 22nd, 1972 to Congressional adoption of a joint resolution proposing the ERA to the states for ratification.⁴⁰ The text of the Equal Rights Amendment is short and concise. It provides:

SECTION 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

SEC. 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

SEC.3. This amendment shall take effect two years after the date of ratification.⁴¹

Despite the relative conciseness of the ERA's language, it has not been without its interpretive problems. One view of the Amendment's basic effect is that it would at least require the courts to treat sex-based classifications as "suspect" in the same manner that it has treated clas-

37. *Cf. Dunn v. Blumstein*, 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting): "Some lines must be drawn. To challenge such lines by the 'compelling state interest' standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection." *But cf. Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (opinion by Justice Powell: state's interest in achieving racial diversity in governmental educational programs is compelling).

38. *See, e.g., Note, Are Sex-Based Classifications Constitutionally Suspect?*, 66 NW. U.L. REV. 481, 493-95 (1971); *Note, Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1173-77 (1969); and note 5 *supra* and sources listed therein.

39. *See Note, Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499, 1507-08 (1971); sources cited at note 4 *supra*.

40. 188 CONG. REC. 9598 (1972).

41. *See* S.J. Res. 8, 92nd Cong., 2d Sess. (1972), H.R.J. Res. 208, 92nd Cong., 1st Sess. (1971), 86 Stat. 1523 (1972), 118 CONG. REC. 9598 (1972).

sifications based upon race, national origin and alienage.⁴² Another is that the Amendment would absolutely prohibit any classification based upon sex, except in those extremely rare instances when the matter being legislated about involves a trait present in all members of one sex but not in any members of the other sex.⁴³ The classic examples of permissible sex-based classifications under such an interpretation are those stemming from a state law that would regulate wet nurses or sperm donors and whose reach would be limited, respectively, to women in one case and to men in the other. Except for such rare cases, however, the Amendment would prohibit any differential treatment based on sex. Although large numbers of individual men and women might continue to be accorded differential treatment under law following ERA ratification, such differential treatment would be the result of their individual differences, and not because of their sex or gender.

II. Impressions of ERA Dangers by Some Opponents

Aside from the uncertainty as to the standard of justification that the Amendment would impose upon sex-based classifications, other perceived consequences of the Amendment have led to considerable opposition to its passage. For example, from the time the ERA was first making its way through the Congressional process which led to the joint resolution sending it to the states for ratification, it was clear that a crucial and highly emotional issue engendered by the proposal was whether women would, as a result of the Amendment, be subject to the same duty of compulsory military service that had previously been the lot of male members of our society in times of international crisis. ERA opponents claimed that women would be subject to the draft. ERA proponents were somewhat divided in their position on this issue, some claiming that they would be, others that they would not.

My own position, maintained throughout the entire period, has been that the clear impact of the Amendment would require women to be subjected to the same burdens as men vis-a-vis their government, and that they would be subject to the draft whenever one was instituted, just as they would be entitled to the same benefits flowing from military service as male members of the armed services.⁴⁴ This does not mean, of course, that women would be drafted in the same num-

42. See *Hearings on S.J. Res. 61 and S.J. Res. 231 Before the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. 165 (1970) (testimony of L. Kanowitz) [hereinafter cited as *1970 Hearings*].

43. See *id.* at 298-99 (testimony of T. Emerson).

44. See Hale & Kanowitz, *Women and the Draft: A Response to Critics of the Equal*

bers as men. The armed services could continue to impose minimal physical requirements for various kinds of military occupations. That fact plus the general differences in the male and female physiques, produced in part by social conditioning, and, perhaps, genetic factors, suggest that, were a draft reinstituted and were it sex-neutral in its operation, many more men than women would find themselves in the armed services on a compulsory basis.

Opposition to the potential draftability of women undoubtedly reflects a concern that it could lead to the sending of women to foreign battlefields where they would face all the horrors of combat. My response to this—the only one that, in my opinion, makes sense in the context of the ERA debate—is that having our youth torn apart by enemy shrapnel is equally horrendous whether the victims are male or female; that our relative equanimity in the face of this prospect periodically faced by the young male members of our society, and our consternation at the thought of this happening to female members of our society, is unfair, irrational, and reveals the fundamental sexist bias of the society at large in the basic realm of a life and death issue.⁴⁵ Whether we should ever have a draft at all, I suggested, is an entirely distinct question from whether, if we do have a draft, women and men may be treated unequally.

That position will, in my opinion, ultimately prevail. Given enough time to overcome the emotional biases triggered by the possibility of drafting American women into the armed forces, especially in time of war, most Americans will come to understand the need to do this if the promise of our nation's greatness is to be fulfilled. Still, I do not doubt that the complexity of this issue coupled with its emotionality has caused many people to oppose the ERA who might otherwise have supported it wholeheartedly.

A second emotionally-charged issue stemming from the ERA is whether it would result in depriving wives of the right to the financial support from their husbands that they appear to enjoy under existing legal doctrine, both during the ongoing marriage and, in the form of alimony, when marriages are dissolved by divorce or a comparable

Rights Amendment, 23 HASTINGS L.J. 199 (1971); Note, *The Equal Rights Amendment and the Military*, 82 YALE L.J. 1533 (1973).

45. See Kanowitz, *The Male Stake in Women's Liberation*, 8 CAL. WEST. L. REV. 424, 429 (1972). The court in *United States v. Reiser*, note 19 *supra*, at 1062 noted that women "will never accomplish total equality unless they are allowed to accept the concomitant obligations of citizenship," (i.e., compulsory military service). See also Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 873-74 (1971).

proceeding. The answers to these fears are clear, though once again they require explanation. In the ongoing marriage, the wife's right to support is more theoretical than real, most courts refusing to fix the amount and frequency of support because of the administrative problems doing so would create, so long as the bare minima of existence are being maintained.⁴⁶ As for post-marital support, even without the ERA, the proposed Uniform Marriage and Divorce Act,⁴⁷ versions of which have already been adopted by many states,⁴⁸ requires the issue to be determined on a sex-neutral basis, the judicial inquiry being limited to ascertaining the financial needs and abilities of the parties to the marriage.⁴⁹ And only 15 days ago, the United States Supreme Court reached a similar conclusion when it invalidated on equal protection grounds a state law permitting alimony awards to wives but not to husbands.⁵⁰ That such an approach is more equitable than the traditional one should be self-evident. This too is, in my view, a conclusion that will be ultimately reached by most people who think about the

46. See, e.g., *McGuire v. McGuire*, 157 Neb. 226, 59 N.W.2d 336 (1953).

47. UNIFORM MARRIAGE AND DIVORCE ACT, § 308 (1973).

48. California has adopted a version of the Uniform Act. CAL. CIV. CODE § 4801 (West Supp. 1978) (amended 1976), for example, provides that the following circumstances shall be considered by the court in determining whether, and in what amount, support payments shall be ordered: "(1) The earning capacity and needs of each spouse. (2) The obligations and assets, including the separate property, of each. (3) The duration of the marriage. (4) The ability of the supported spouse to engage in gainful employment without interfering with the interests of dependent children in the custody of the spouse. (5) The time required for the supported spouse to acquire appropriate education, training, and employment. (6) The age and health of the parties. (7) The standard of living of the parties. (8) Any other factors which it deems just and equitable."

49. The Uniform Act indirectly discourages maintenance awards by preferring allocation of property to the parties to provide necessary support. Maintenance payments may be awarded only if the Court finds that the spouse seeking maintenance: "(1) lacks sufficient property to provide for his reasonable needs; and (2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home. (b) The maintenance order shall be in such amounts and for periods of time as the court deems just, without regard to marital misconduct, and after considering all relevant factors including: (1) the financial resources of the party seeking maintenance, including marital property apportioned to him, his ability to meet his needs independently, and the extent to which a provision for support of a child living with the party includes a sum for that party as custodian; (2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment; (3) the standard of living established during the marriage; (4) the duration of the marriage; (5) the age and the physical and emotional condition of the spouse seeking maintenance; and (6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance." UNIFORM MARRIAGE AND DIVORCE ACT § 308, 435-36 (1973). See also Goodman, Oberman & Wheat, *Rights and Obligations of Child Support*, 7 Sw. U.L. REV. 36 (1975).

50. *Orr v. Orr*, 47 U.S.L.W. 4224 (1929).

problem. Nevertheless, this issue also has proved to be a stumbling block to garnering universal and total support for the ERA.

Still another fundamental concern that has engendered some opposition to the ERA is the fear that, following its adoption, the existing preferences for mothers over fathers in disputes over the custody of minor children will be abrogated.⁵¹ Again, I cannot refute this analysis of the ERA opponents as to the Amendment's probable effect. Where they are wrong, however, is in the premise upon which they base their further conclusion that this effect provides a proper reason for opposing the ERA. It simply assumes that, all other things being equal, it is right, just, fair, and proper to prefer mothers over fathers at all times in custody disputes solely on the basis of their sex.⁵² A moment's reflection will reveal the illogic of that position. That fathers are capable of maintaining, and should be encouraged to maintain, meaningful relationships with their children is a self-evident proposition. Social science research suggests, moreover, that this would have a profoundly ameliorative effect upon such problems in American society as crime and delinquency, let alone confusions about sexuality. Once again, developments under existing constitutional provisions suggest that the courts, as well as lawyers and their clients, are becoming increasingly aware of these factors;⁵³ the presumption favoring mothers as custodians of children of tender years has recently been discarded in many states.⁵⁴ But, like the other issues mentioned earlier, this one too has engendered much emotional anti-ERA sentiment.

An issue that has plagued the ERA campaign from the beginning has been its potential effect upon state protective laws that have previously applied to women workers only. This caused initial opposition to the Amendment from leaders of organized labor. They believed that the hard-won gains for women workers in many states, such as weight-lifting restrictions,⁵⁵ minimum wage guarantees,⁵⁶ and maximum hours

51. This attitude was formerly embodied in statutory law. See former CAL. CIV. CODE § 138(2), note 14 *supra*.

52. See comment on Georgia law preferring unwed mothers to unwed fathers, note 14 *supra*.

53. See, e.g., *Watts v. Watts*, 350 N.Y.S. 2d 285 (1973) (presumption that mother should have custody of children of tender years violated state law and was unconstitutional). See also Foster & Freed, *Child Custody*, 39 N.Y.U.L. REV. 423 (1964); Podell, Peck & First, *Custody—To Which Parent?*, 56 MARQ. UNIV. L. REV. 51 (1972).

54. See, e.g., CAL. CIV. CODE § 4600(a) (West Supp. 1979), as amended by 1972 Cal. Stats., ch. 1007, § 1, deleting the former language which stated: "but, other things being equal, custody shall be given to the mother if the child is of tender years." See note 14 *supra*.

55. See, e.g., *Ridinger v. General Motors Corp.*, 325 F. Supp. 1089, 1093-94 (S.D. Ohio

provisions,⁵⁷ would all be lost as a result of the Amendment. My own position, I must admit, was at one time lukewarm on the Amendment precisely because of my concerns about its potential effects in this area.⁵⁸ Only after my own research convinced me that the application of these laws to women only was the result of historical accident, and that the way was open to achieve sex equality in this realm by extending the benefit of such laws to both sexes without sacrificing those hard-won social gains, did I wholeheartedly and enthusiastically support the Amendment.⁵⁹ At the same time, there is no doubt that apprehensions about the possible effects of the ERA upon women-only state protective labor laws have turned many a potential ERA supporter into an opponent. Again, with enough time to explore this complex issue in the course of the national debate, many if not most of those opponents will undoubtedly be persuaded to change their minds.

Finally, a substantive objection to the ERA, which did not arise until the Amendment came up for consideration before various state legislatures, has been based on Section 2 which, you will recall, provides that "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." Though similar language appears in other constitutional amendments, most notably the crucial Fourteenth, ERA opponents soon began to raise the alarm that it would permit the federal government to interfere with state control of areas that have historically been regarded as exclusively of state concern. These areas include marriage and family laws, abortion, child-parent, and husband-wife relationships. The specter of the giant, impersonal and remote Washington bureaucracy making decisions that vitally affect such questions in Arizona, Nevada, Georgia and South Carolina has inevitably aroused additional opposition from certain sections of those states' populations.

1971). State statutes restricting employment of females in factories were held in conflict with, and superseded by, equal employment opportunities provisions of 1964 Civil Rights Act, which prohibit discrimination in employment unless sex is a bona fide occupational qualification reasonably necessary to normal operation of business.

56. See U.S. DEP'T. OF LABOR, WOMEN'S BUREAU, ANALYSIS OF COVERAGE AND WAGE RATES OF STATE MINIMUM WAGE LAWS AND ORDERS, *passim* (Bulletin 291, Aug. 1, 1965).

57. See, e.g., *Ridinger v. General Motors Corp.*, 325 F. Supp. 1089, 1092-94 (S.D. Ohio 1971).

58. See KANOWITZ, WOMEN AND THE LAW, *supra* note 4, at 192-96.

59. See 1970 Hearings, *supra* note 42, at 161, 172-74. That research apparently contributed, along with pressure from rank-and-file women members of the organized labor movement, to a dramatic turnabout in the position of the AFL-CIO leadership who, for these last six or seven years, have been among the most active and influential ERA supporters.

But here too, the spuriousness of this anti-ERA argument can be seen if one but casts a glance at the already enormous power of the national Congress to legislate in almost unlimited fashion in almost unlimited areas, as a result of the Supreme Court's expansive interpretations of the commerce clause,⁶⁰ among other constitutional provisions.⁶¹ That Congress has not legislated about marriage and divorce, husband and wife, and children and parent relationships, does not, in my opinion, result from an absence of Congressional power to do so. Rather, it reflects two fundamental political facts. One is that Congress has much else to occupy its attention. The other is that members of the House of Representatives and United States Senate are elected by voters of separate states; they are, therefore, ultimately responsible, politically speaking, to the wishes and desires of their constituents within the states. Section 2 of the ERA therefore would not confer any powers on Congress that it does not already enjoy. Nevertheless, once again, this perception of a possible ERA effect has contributed to some opposition to the Amendment.

These, then, are the bases for some of the principal substantive objections to the Amendment. Whether the objections are based on major or minor considerations, there are, as I have tried to demonstrate, principled, logical, and dispositive answers that can be and often have been brought to bear by the Amendment's supporters. Those answers, unfortunately, have not always been communicated, partly because many ERA opponents have refused "to be confused by the facts." Others, though willing to listen, have often found it hard to understand because of the complexities and legal technicalities that are unavoidably involved in those answers.

Despite such difficulties, public opinion polls demonstrate that most Americans support ERA ratification.⁶² Among these supporters

60. See, e.g., *Katzbach v. McClung*, 379 U.S. 294 (1964). Title II of Civil Rights Act of 1964, § 201, 42 U.S.C. § 2000a (1964), which prohibits discrimination in places of public accommodation, was held to be within the Congressional power to regulate interstate commerce as applied to a small restaurant that served mostly local patrons. The *Katzbach* Court held that the restaurant was sufficiently connected with interstate commerce to justify Congressional exercise of power because a substantial portion of the food served in the restaurant had moved in interstate commerce. See also *Perez v. United States*, 402 U.S. 146 (1971), where sufficient connection was found between purely local "loan-sharking" and interstate crime to sustain regulation and prohibition by Congress of such activities in Title II of the Consumer Credit Protection Act, § 201, 18 U.S.C. § 891 *et seq.* (Supp. V 1964). The law is based on the Congressional finding that local extortionate credit transactions adversely affect interstate commerce.

61. See, e.g., U.S. CONST. amend. XIV, § 5.

62. A 1975 Gallup Poll revealed that 58% of those interviewed favored the Amendment, while only 24% were opposed. A 1976 Gallup Poll produced similar results, with 57% in

are undoubtedly many who understand the issues in all their complexity and who have made considered decisions that the costs of not ratifying the Amendment far outweigh the benefits that might flow from its ratification. At the same time, there are probably many who, as counterparts to ERA opponents, intuitively feel that a constitutional amendment guaranteeing equality of the sexes under law is desirable, while not necessarily perceiving all its complexities and technicalities, or even making the effort to do so.

III. Tactical Errors by Some ERA Proponents

Notwithstanding the overwhelming support for the ERA, however, it still has not been ratified within the original seven-year period. Why? For one thing, because of the concerns mentioned earlier, as unfounded as they might be, much of the opposition to the Amendment has been as determined as the support for it. For another, the amending process was deliberately made difficult by the framers of the Federal Constitution. Not only must the joint resolution sending the Amendment on its ratification road be adopted by the extraordinary majority of two-thirds of each house of Congress, but it has to be ratified by three-fourths of the state legislatures, i.e., 38 of the 50.⁶³ The result is that a determined, well-organized opposition can effectively block a proposed amendment. And in the case of the ERA, the opposition has been decidedly determined and well-organized.

Not coincidentally, refusal to ratify has occurred chiefly in the states of the old Confederacy, and in the states where the Mormon Church, a principal foe of the Amendment, has been extremely influential.⁶⁴ For many, the ERA has been merely part of a larger battle between "conservatives" and "liberals."

Here, I must allude to some over-all tactical errors of certain sections—at times the most visible and vocal sections—of the women's rights movement that have also contributed to the failure to achieve the ERA's ratification within the original seven years. At one stage of, but

favor and 24 % opposed. THE GALLUP POLL: PUBLIC OPINION 1972-77 447, 684 (G. GALLUP ed. 1978).

63. The amending process of the federal constitution is set forth in art. 5: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution . . . which . . . shall be valid . . . as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States. . . ."

64. Alabama, Georgia, Florida, South Carolina, North Carolina, Virginia, Arkansas and Oklahoma are among the southern states that have not ratified. Utah, center of the Mormon Church, has not ratified. Tennessee, Nebraska and Idaho have purported to rescind. See note 3 *supra*.

to some extent throughout, the campaign for the Amendment, many of its supporters have conveyed the strong impression—at times unwittingly, at other times deliberately—that they regard women who work in the home and who do not hold jobs in the world outside as being somehow less worthy human beings than those who do hold such jobs. To the extent that this view has been associated with support for the ERA, it has inevitably engendered opposition from women who sincerely and honestly believe that they can fulfill themselves in the roles of wife and mother—though they might have welcomed the views of the vast majority of ERA proponents that they should have a choice in such matters, and that they should not be forced into such roles by laws and governmental actions. But, as I have suggested, that view held by a majority of ERA supporters has often not been nearly as visible or discernible as the view of a minority of other ERA supporters which, to employ the vernacular, simply turned many people off.

Another error committed by some elements in the women's rights movement has been to allow the impression to take hold that adoption of the ERA will, somehow, legitimize homosexual relationships under American law and in American society. I hesitate to speak for others, but I suspect that many of the people who originally testified on behalf of the ERA before various congressional committees—in my case before both the United States Senate Judiciary Committee⁶⁵ and the United States House Judiciary Committee⁶⁶—share my belief that it is high time that state and federal governments take their feet off the necks of people whose sexual preferences differ from those of the majority. But, for a very simple reason, we did not suggest to the members of Congress before whom we appeared that this goal was to be achieved by adoption of the ERA. That reason was our perception that it was going to be an enormously difficult task to persuade legislators and citizens alike simply to examine their longstanding prejudices about fixed roles for men and women in law and society. To add to it the burden of persuading them to revise their attitudes about what many perceived to be sexual deviationism, in the context of a campaign for the ERA, would simply make that task much more difficult, if not impossible.

Moreover, there were promising developments with respect to the rights of homosexuals under other existing provisions of the federal

65. See notes 59 and 42 *supra*.

66. See *Hearings on H.J. Res. 35 & 208 and H.R. 916 Before the House Comm. on the Judiciary*, 92d Cong., 1st Sess. 343 (1971) (testimony of L. Kanowitz).

constitution.⁶⁷ Therefore, as I understood it—and I assume the others shared my views—to introduce the homosexuality issue into the ERA campaign was simply to load that campaign with an issue that, though admittedly related, was sufficiently tangential and emotionally-charged to require its separation from the question of equal treatment of the sexes under law. But the impression created by the words and actions of many ERA proponents that the ERA will achieve so-called “gay liberation” has inevitably hardened the opposition of those who are already inclined to oppose the ERA, and has turned many a potential supporter of the Amendment into an opponent.

Still another tactical shortcoming has been that, despite the recognition by most thoughtful members of the women’s rights movement that both men and women have been victims of a social and legal system that arbitrarily assigns roles on the basis of sex, some women have conveyed the impression that the fundamental issue involves a struggle by women *against* men. Thus, many men, potential allies in this struggle for fundamental human rights, have been deterred from lending their support by what they perceive as the ERA’s threat to their own self-interest as a result of the context within which some pro-ERA activists have waged the campaign for the Amendment.

Finally, the abortion issue, though related to the question of women’s rights in a very direct sense, has never really been involved in either the text or the potential impact of the ERA. Nevertheless, many opponents of an unlimited right to abortion—an issue that is perceived one way if attention is focused upon the right of a woman to control her own body, but another way if the rights of a foetus or the value to be assigned to the potentiality of life of the foetus is one’s central concern—have associated the abortion question with the ERA. Because of their strong anti-abortion stand, often based on deeply felt religious and moral conviction, their ability to judge the ERA on its merits has been greatly impaired.

These have been, in my view, some of the major factors that have kept the ERA from being ratified within the first seven years. They

67. See W. BARNETT, *SEXUAL FREEDOM AND THE CONSTITUTION* (1973). Attacks against statutes prohibiting homosexuality and homosexual acts have been raised on several constitutional grounds: under the right to privacy stemming from the Bill of Rights, *Buchanan v. Batchelor*, 308 F. Supp. 729 (N.D. Tex. 1970), *vacated and remanded for reconsideration on constitutional grounds sub nom. Wade v. Buchanan*, 401 U.S. 989 (1971); that criminal statutes proscribing sodomy are void for vagueness, *Hogan v. State*, 84 Nev. 372, 441 P.2d 620 (1968); and that sodomy laws are an establishment of religion in violation of the First Amendment establishment clause, *State v. Rinehart*, 70 Wash. 2d 649, 424 P.2d 906 (1967), *cert. denied*, 389 U.S. 832 (1967).

were by no means the only ones. For example, the extraordinary three-fifths majority vote of its legislators required by Illinois to ratify a federal constitutional amendment⁶⁸—a requirement that is not without its own constitutional problems—has undoubtedly been another contributing factor, especially if Illinois' strategic importance and the likely effect its ratification might have had on other undecided states is considered. The opponents' concentration of their efforts in the most promising states—considered from their viewpoint—also played a part. So did the organizational effectiveness of the anti-ERA leadership. And, finally, there is the effect of the news media, which have often delighted in featuring the antics of some fringe elements of the women's rights movement because this made good copy, while often ignoring the positions of the vast majority of participants in that movement which were thoughtful, sophisticated, and cogent.

IV. Some Achievements of the Campaign to Date

Having examined some of the more important reasons why the ERA has not yet been ratified, I would now like to discuss the positive results produced by the pro-ERA campaign to date. For one thing, the 35 state ratifications garnered so far will of course be crucial if the remaining three ratifications are obtained within the next 39 months. For another, the pro-ERA efforts during these past seven years have undoubtedly contributed to the changed jurisprudence of the United States Supreme Court on the subject of sex discrimination and the existing provisions of the United States Constitution. Nor was the Court the only institution in American life to develop a new understanding of the sex role issue during these last seven years. The Congress, the state legislatures, the state courts, and, above all, the American people, now entertain views about the roles of men and women in our society that are fundamentally different from, and decidedly more progressive than, the views they had when the campaign to ratify the Amendment was first launched.

At the Supreme Court level, when the start of the ratification process became imminent, the case of *Reed v. Reed*⁶⁹ was decided. It invalidated, as a violation of the Fourteenth Amendment's equal protection guarantee, an Idaho statute that preferred women over similarly situated men for appointment as administrators of dead persons' estates. Though purporting to apply the "any-rational-basis" test that had pre-

68. ILL. CONST. art. 14, § 4.

69. 404 U.S. 71 (1971).

vailed in past sex discrimination cases, the Court, both in its result and in some of its language, left the strong impression that it was applying a more stringent standard in judging this sex-based classification than any it had previously applied.

That the Court had in fact done this in *Reed* soon became apparent in another decision, *Frontiero v. Richardson*,⁷⁰ invalidating, under the equal-protection aspect of the Fifth Amendment's due process clause, federal statutes providing greater benefits to male members of the armed services than to female members. In *Frontiero*, four members of the Court expressly adopted the suspect-classification analysis for classifications based upon sex.⁷¹ This test, you will recall, imposes a much more burdensome and difficult standard of justification upon one who seeks to sustain the classification than does the any-rational-basis test for equal protection purposes that is applied to ordinary economic and social legislation. Had the views of these four members of the Court become the majority view, sex classifications would now be treated in the same manner as classifications based upon race, national origin, and alienage. They could be supported only by a showing that they are necessary to achieve an overwhelming or compelling governmental interest. But four members of the Court do not a majority make. The result in *Frontiero* was reached only because it was concurred in by another member of the Court, Justice Stewart, in a short, cryptic opinion which did not embrace the suspect characterization of sex-based classifications.⁷²

70. 411 U.S. 677 (1973).

71. *Id.* at 682, 688.

72. Justice Powell, concurring in the judgment and joined by Chief Justice Burger and Justice Blackmun, interpreted the meaning of the proposed Equal Rights Amendment in the opposite sense from that adopted by the plurality opinion in *Frontiero*. *Id.* at 691. The plurality cited passage of the Equal Rights Amendment resolution as support for its finding that classifications based on sex are inherently invidious. *Id.* at 687. In his concurring opinion, Justice Powell stated that the court should defer categorizing sex classifications as suspect due to the pendency of the Equal Rights Amendment. He expressed the view that the amendatory process is the proper manner in which to embody proscription of sex classifications as "suspect": "By acting prematurely and unnecessarily, as I view it, the Court has assumed a decisional responsibility at the very time when state legislatures, functioning within the traditional democratic process, are debating the proposed Amendment. It seems to me that this reaching out to pre-empt by judicial action a major political decision which is currently in process of resolution does not reflect appropriate respect for duly prescribed legislative processes.

"There are times when this Court, under our system, cannot avoid a constitutional decision on issues which normally should be resolved by the elected representatives of the people. But democratic institutions are weakened, and confidence in the restraint of the Court is impaired, when we appear unnecessarily to decide sensitive issues of broad social and

Finally, in *Craig v. Boren*,⁷³ a Court majority endorsed a level of scrutiny of sex-based classifications that falls somewhere between the any-rational-basis test that had previously prevailed in this area and the suspect classification, heightened scrutiny of the compelling governmental interest test.⁷⁴ *Craig* also established that discrimination directed against males because of their sex or gender is just as constitutionally vulnerable as that directed against females if the new test is not satisfied.⁷⁵

Along with these decisions, the Court, in several other cases, held that if the purpose of a law-imposed classification was to grant a preference to women in order to correct the present effects of past discrimination, such a preference, or benign discrimination, is constitutionally permissible. The leading case for this proposition is *Kahn v. Shevin*,⁷⁶ upholding a Florida tax-exemption for widows though no similar exemption was provided for widowers in that state. In that case, two members of the Court suggest that men, unlike women, have not been the victims of past sex discrimination.⁷⁷ That view, I suggest, is short-sighted. It fails to appreciate that whether one talks of the male's unique obligation of compulsory military service, his primary duty for spousal and child support, or his lack of the same kinds of protective labor legislation that have traditionally been enjoyed by women, he has paid an awesome price for other advantages he has presumably enjoyed over women in our society.

Significantly, the "benign discrimination" which the Court permit-

political importance at the very time they are under consideration within the prescribed constitutional processes." *Id.* at 692.

As noted in the discussion of *Craig v. Boren*, 429 U.S. 190 (1976), see notes 73-77 and 82-83 and accompanying text *supra*, members of the plurality in *Frontiero* subsequently retreated from their view that sex classifications are "suspect."

73. 429 U.S. 190 (1976).

74. The standard of scrutiny was formulated as follows: "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 197. For a discussion of "middle tier" analysis from its inception in *Reed*, see Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for A Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

75. 429 U.S. 190 (1976); see also *Orr v. Orr*, 47 U.S.L.W. 4224 (1979).

76. 416 U.S. 351 (1974); see also *Califano v. Webster*, 430 U.S. 313 (1977); *Schlesinger v. Ballard*, 419 U.S. 498 (1975).

77. "While doubtless some widowers are in financial need, no one suggests that such need results from sex discrimination as in the case of widows." 416 U.S. at 360 (Brennan, J., dissenting); see also, *Craig v. Boren*, 429 U.S. 190, 219 (1976) (Rehnquist, J., dissenting): "There is no suggestion in the Court's opinion that males in this age group are in any way peculiarly disadvantaged, subject to systematic discriminatory treatment, or otherwise in need of special solicitude from the courts."

ted on behalf of women in the face of due process and equal protection challenges under the Fifth and Fourteenth Amendments has not been allowed when the issue confronting the Court was whether a state medical school could constitutionally prefer black people over white people solely on the basis of race in its admissions policies, absent a record of any prior racial discrimination by that school.⁷⁸ Were the ERA to become part of the Constitution, moreover, the "benign" sex discrimination allowed in such cases as *Kahn v. Shevin*⁷⁹ and *Califano v. Webster*⁸⁰ would, in my opinion, be impermissible, since its prohibition against unequal treatment on the basis of sex is absolute.⁸¹ That the ERA is perceived as having this effect is no doubt cause for the opposition to the Amendment from some Americans who believe that the law's remaining preferences for women should be preserved.

Despite the Court's uneven record in the sex discrimination area during the past seven years, caused chiefly by its benign discrimination doctrine, it has dramatically improved its performance over what it was at the start of the period. In cases in which women or men can be shown to be subject to differential treatment by the law, such treatment can now be sustained only if it satisfies the heightened level of scrutiny prescribed by *Craig v. Boren*.⁸² In the Court's words in that case: "To withstand constitutional challenge . . . classifications by gender must serve *important* governmental objectives and must be *substantially* related to achievement of those objectives."⁸³ While this burden of justification is not as great as I and other equal-rights advocates would like, being less onerous than the one applied in race discrimination cases and much less than would be required by the ERA, it nevertheless rep-

78. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). Technically, *Bakke* was not a constitutional decision, since only Justice Powell held that a numerical quota based on race, even if aimed at correcting the present effects of past societal discrimination, violated the Fourteenth Amendment's equal protection guarantee. The Court's invalidation of the quota was achieved, however, because four other members of the court held that it violated Title VI of the 1964 Civil Rights Act.

79. 416 U.S. 351 (1974) (widows could constitutionally be granted property tax exemption, but not widowers, because loss of husband imposes greater financial impact than loss of wife).

80. 430 U.S. 313 (1977). *Webster* held constitutional a statute allowing women to subtract three more lower earning years than males, as it helped remedy the effects of past discrimination when women applied for social security benefits.

81. *But see* *Marchioro v. Chaney*, 47 U.S.L.W. 2090 (1978) (Washington Supreme Court) (A Washington statute which requires that both sexes be equally represented on political party state committees, and that chairman and vice-chairman of state committees be of opposite sexes, does not violate the state constitution's equal rights amendment.)

82. 429 U.S. at 197. See note 74 *supra*.

83. 429 U.S. at 197 (emphasis added).

resents a significant step forward from the "any-rational-basis" test that had prevailed at the beginning of the ratification campaign. This new standard will have the practical effect of invalidating numerous sex discriminatory laws and official practices that would have passed constitutional muster under the earlier doctrine.

That this progress by the Court—as incomplete as it has been—was prompted in large part by the pro-ERA campaign appears self-evident. To be sure, other developments in the campaign for sex equality, aside from the pro-ERA efforts, also contributed to the changed perceptions by members of the Court. Indeed, various members of the Court have candidly acknowledged the fact that we are living in a new day insofar as society's views on sex-roles are concerned.⁸⁴ And Justice Powell, while drawing a negative inference from the fact, also has admitted that the campaign to ratify the ERA is a factor to be considered in deciding whether to give the existing constitutional provisions a more important role in sex discrimination cases.⁸⁵ While his conclusion has been that the Court should tread carefully in this area because the American people will be making the fundamental political decision about sex equality under the Constitution when they either ratify or fail to ratify the ERA,⁸⁶ it is clear that other members of the Court understand that the pro-ERA drive has been made necessary by the Court's prior grudging application of existing constitutional provisions to the problems of sex discrimination and the law. Their new rulings in sex discrimination cases have been heading in the direction, although falling far short of the goal, of making the ERA a constitutional redundancy—a development I had looked forward to when testifying in support of the ERA in Congress.⁸⁷

In speaking of the effect of the pro-ERA campaign upon the Supreme Court, one must recognize that this effect followed another—namely the one upon the understanding of the American people themselves. Only after Americans were persuaded of the rightness of equal treatment without regard to sex as a social principle did their convictions filter down (or up) to members of the Court.

Although I cannot document this, my life's experience has convinced me that people learn best under stress. One can cajole and try to

84. See, e.g., *Stanton v. Stanton*, 421 U.S. 7, 14-15 (1975); *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975).

85. See Justice Powell's concurrence in the judgment in *Frontiero v. Richardson*, discussed at note 72 *supra*.

86. *Id.*

87. See 1970 Hearings, *supra* note 42, at 164.

persuade in calm, dispassionate tones with limited results. But the same arguments made in the context of a hard-fought *contest* over a social or political issue seem to be perceived with greater intensity by those to whom they are directed. As mentioned earlier,⁸⁸ more than the ERA campaign has been occurring in recent years to heighten people's consciousness about sex roles in American society. But the ERA has been a central theme around which other efforts have often been mobilized.

Nor has the changed jurisprudence of the United States Supreme Court in applying existing constitutional provisions to sex discrimination cases been the only positive effect of the national ERA campaign. Equal-rights provisions, many tracking the language of the proposed federal ERA, are now contained in the constitutions of at least 16 states.⁸⁹ Though some antedated the ERA-ratification-campaign, most were adopted after the campaign was started, and were undoubtedly inspired by it. Having personally participated in the successful efforts to adopt an equal-rights amendment to the New Mexico Constitution,⁹⁰ I can attest to the close links between the national campaign and the one directed toward achieving a state equal-rights constitutional guarantee.

What is more, during the entire period of the ERA campaign, important gains for the principle of sex-based equality were made through new laws enacted by Congress and the state legislatures. To be sure, the 1963 Equal Pay Act,⁹¹ Title VII of the 1964 Civil Rights Act,⁹² and the amendment of Executive Order 12246 by Order 11375,⁹³ all of which outlawed various forms of sex discrimination in employment, preceded the ratification phase of the ERA campaign. Still, they coincided with the heightened efforts to shepherd the ERA through Congress that occurred during those years. Since the ratification phase of

88. See text accompanying notes 38 and 39 *supra*.

89. ALAS. CONST. art. I, § 3; COLO. CONST. art. II, § 29; CONN. CONST. art. I, § 20; HAWAII CONST. art. I, § 4; ILL. CONST. art. I, § 18; MD. CONST. DECL. OF RTS. art. 46; MONT. CONST. art. II, § 4; N.H. CONST. Pt. I, art. 2d; N.M. CONST. art. II, § 18; PA. CONST. art. I § 28; TEX. CONST. art. I, § 3a; UTAH CONST. art. IV, § 1; VA. CONST. art. I, § 11; WASH. CONST. art. 31, §§ 1, 2; WYO. CONST. art. I, §§ 2, 3. See Kurtz, *The State Equal Rights Amendments and Their Impact on Domestic Relations Law*, 11 FAM. L. Q. 101 (1977).

90. See generally *Symposium: The New Mexico Equal Rights Amendment—Assessing Its Impact*, 3 N.M. L. REV. 1-135 (1973).

91. Pub. L. No. 88-38, § 3, 77 Stat. 56 (codified at 29 U.S.C. § 206(d)(1) (1963)).

92. Pub. L. No. 88-352, 78 Stat. 253 (codified at 42 U.S.C. § 2000e *et seq.* (1964)).

93. Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965), as amended by Exec. Order No. 13,375, 32 Fed. Reg. 14,303 (1967); 30 Fed. Reg. 12,935 (1965), as amended by Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (1967).

the ERA campaign began, moreover, new legislation such as Title IX of the Education Amendments of 1972,⁹⁴ the Equal Credit Opportunity Act,⁹⁵ and many other legislative attacks on sex discriminatory laws and practices, have been enacted.

V. The Years Ahead

To this point, we have been examining developments of the past seven years. The question now is what does the future hold for the principle of sex equality under American law? Specifically, what is the likely future course of the United States Supreme Court decisions in this field, and what are the prospects for ratification of the ERA within the next 39 months?

In my opinion, certain members of the Court may conclude that the temporary setback suffered by the ERA signifies the American people's rejection of the principle of equality of the sexes under the law. Such a conclusion, I suggest, would be mistaken. It would fail to take into account the evidence of the public opinion polls referred to above.⁹⁶ What is more important is that it would ignore the feelings of large numbers of pro-equality advocates who have been persuaded by ERA opponents that a new constitutional provision is unnecessary because the Court has already embarked upon a vigorous application of existing constitutional provisions to sex discrimination issues. Their opposition has therefore been based upon their assumption—nurtured by many anti-ERA leaders—that the ERA is unnecessary because the Court can—indeed must—guarantee sex equality under the equal-protection clause of the Fourteenth Amendment and the due-process clause of the Fifth Amendment, among other existing constitutional provisions. And, of course, with the additional 39 months allotted by Congress for the ratification process to go forward, the Amendment cannot be said to have been rejected by the American people.⁹⁷

94. Education Amendments of 1972, Pub. L. No. 92-318, tit. IX, § 901, 86 Stat. 373 (amending 20 U.S.C. §§ 1681-86 (1970)). Section 901(a) of Title IX (20 U.S.C. § 1681(a) (1976)) provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance . . ." See Bueck & Orleans, *Sex Discrimination—A Bar to a Democratic Education: Overview of Title IX of the Education Amendments of 1972*, 6 CONN. L. REV. 1 (1973).

95. 15 U.S.C. § 1661 *et seq.* (1976).

96. See note 62 *supra*.

97. The validity of the 39-month extension will undoubtedly be the subject of future litigation in view of the conflicting opinions of constitutional-law experts expressed during Congressional hearings on the extension. See Report of the Judiciary Committee on the Proposed Equal Rights Amendment Extension, 95th Congress, 2d session, House of Repre-

Nine years ago, testifying in support of the ERA before the United States Senate Judiciary Committee, I stated that, "even after the adoption of the Equal Rights Amendment, the crucial factor will continue to be the responsiveness of the judiciary to the social impulse toward equal treatment without regard to sex."⁹⁸ I continue to believe that. The need for intensive political activity seeking equal treatment without regard to sex will be as crucial in the years ahead as it has been in the past. Such activity will obviously occur on many fronts. But what better rallying point to guarantee that such activity will be sustained than the continued efforts on behalf of the ERA.

Above all, it is crucial that such activity be intensified by those who understand the fundamental issue as being one of ending discrimination against *women and men* solely because of their sex. They should make sure that the American public understands the issue in these terms, rather than as one involving a battle of the sexes. At the same time, they should take care not to becloud the remaining months of the ERA campaign with issues—no matter how meritorious they might be in their own right—that are extraneous to the ERA's fundamental aims and that unnecessarily deter potential allies from joining in the campaign.

If this is done, we can look forward with some confidence to the creation of a truly sex-neutral society in our country that will inspire the rest of the world; a society in which the original promise of America's greatness will have come much closer to fulfillment; a society in which, because of the demonstrated relationship between rigid sex role stratification and the tendency toward human aggression,⁹⁹ family relations will be improved, crime and delinquency diminished, and violent solutions to disputes between nations less likely to be sought.

sentatives, Report No. 95-1405 (August 1, 1978). The principal arguments by the opponents of the extension have been that it required a two-thirds vote of Congress, rather than a mere majority, even if Congress had the power to change the required time limit. The opponents of extension further argued that, in any event, the original seven-year limit for ratification was immutable. More persuasive to Congress, however, were the arguments of the advocates of extension that since the original time-limit was not contained in the body of the amendment itself, but appeared only in the proposal, Congress retained authority to review the limit should circumstances warrant, and that for the same reasons, only a simple majority vote, rather than a two-thirds vote, was required on the extension question. Regardless of the ultimate determination of this question as a matter of law, it is clear that the extension will be perceived by many people as a species of rule-changing after the game has started, thereby presenting an additional obstacle to ratification during the extended period.

98. See 1970 Hearings, *supra* note 42, at 166.

99. See L. KANOWITZ, *WOMEN AND THE LAW*, *supra* note 4, at 197.